ASCENTIVE, LLC v. GOOGLE, INC. Doc. 13

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| ASCENTIVE, LLC,<br>Plaintiff,<br>v.<br>GOOGLE, INC.,<br>Defendant. | Civil Action No. 2:09-cv-02871 |

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR EXPEDITED DISCOVERY**

Plaintiff Ascentive, LLC ("Ascentive"), is a computer software company that generates approximately 99 percent of its revenues from online software sales, with the majority of these sales occurring after consumers search for Ascentive's brand names through the search engine of defendant Google, Inc. ("Google"), and click through to Ascentive's websites. (*See* Schran Decl., attached to Ascentive's Motion for Preliminary Injunction, at ¶¶ 9-17). Beginning in 2008 with the launch of products such as its FinallyFast software, Ascentive began aggressively combating its competitors' use of Ascentive's trademarks in misleading Google advertisements, which resulted in increased consumer traffic to Ascentive's websites and accompanying increased revenues. (*Id.* at ¶¶ 30-31). Google, however, undermined Ascentive's ability to protect its trademarks, and ultimately completely thwarted Ascentive's ability to do so by banning Ascentive from Google's advertising programs and search listings entirely. (*Id.* at ¶ 36). As a result, Ascentive's prospective customers are unable to locate its websites and are directed instead to the websites of Ascentive's competitors.

To halt this irreparable harm, Ascentive has filed a motion for preliminary injunction against Google based on Google's continuing refusals to cease: (1) displaying Ascentive's

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trademarks in the text of Ascentive's competitors' advertisements, in violation of Google's own contract and policies; (2) encouraging Ascentive's competitors to target their ads to consumers seeking Ascentive's products by purchasing Ascentive's trademarks as Google "keywords"; and (3) refusing to display Ascentive's advertisements and websites along with those of Ascentive's competitors, in responsse to consumers' searches for Ascentive's products.

Ascentive seeks limited, expedited discovery to obtain additional evidence in support of its claims for preliminary-injunctive relief. Specifically, as Google has failed to identify any basis for its decisions to ban Ascentive from its advertising programs and search listings, Ascentive seeks to obtain more information as to the reason for Google's conduct. Google informed Ascentive only that Google's ban of Ascentive was due to "multiple policy disapprovals," without defining this term or identifying any Google policy purportedly violated by Ascentive. As Google's basis for the ban is relevant to Ascentive's claims in this matter, it requires further discovery. In addition, Ascentive seeks to discover whether Google performed any internal investigation of the use of Ascentive's trademarks in its ad text, which Google agrees to do under its own contract and policies. Finally, Ascentive seeks additional information related to the use of Ascentive's trademarks by Google and by third-party advertisers.

To this end, Ascentive requests the ability to propound written discovery and to take one or more depositions of representative(s) of Google. A copy of plaintiffs' proposed document requests and deposition notice pursuant to Federal Rule of Civil Procedure 30(b)(6) are attached as Exhibits A and B.

Accordingly, Ascentive requests that the Court: (1) grant immediate permission to serve its document requests and deposition notice on defendant Google; (2) require Google to respond to Ascentive's written discovery within five business days of issuance of the Court's order; and (3) permit Ascentive to depose a corporate designee(s) of Google on a date and time mutually convenient for the parties but, in any event, no later than five business days after Google's production of documents.

## ARGUMENT

The Federal Rules of Civil Procedure provide trial courts wide latitude in managing the discovery process. *See New York v. U.S. Metals Refining Co.*, 771 F.2d 796, 805 (3d Cir. 1985) ("Rule 26 provides very broad discovery and gives the trial court wide discretion to manage the process.") For instance, courts may shorten the time period for response to interrogatories and document requests. F.R.C.P. 33(b), 34(b). A shortened discovery schedule -- i.e., expedited discovery -- is particularly appropriate in injunctive proceedings. *See Educ. Comm'n for Foreign Sch. Med. Graduates v. Repik*, 1999 WL 317052, at *3 (E.D. Pa. May 17, 1999) ("Expedited discovery in connection with a preliminary injunction motion is appropriate.") (citing cases); *accord Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) ("Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings.") Indeed, courts routinely order such discovery in anticipation of a preliminary injunction hearing. *See, e.g., Shields v. Zuccarini*, 254 F.3d 476, 480-81 (3d Cir. 2001) (trial court ordered expedited discovery in anticipation of preliminary-injunction hearing); *Acierno v. Mitchell*, 6 F.3d 970, 973 (3d Cir. 1993) (same).

Ascentive seeks expedited discovery to prepare for the anticipated preliminary injunction hearing before this Court. By permitting Ascentive's request, the Court will ensure that it receives all the pertinent evidence before deciding Ascentive's preliminary-injunction motion. *See Eduata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (ordering expedited discovery, stating, "Further development of the record before the preliminary injunction hearing will better enable the court to judge the parties' interests and respective chances for success on the merits.") Conversely, because Ascentive is propounding limited document requests and requesting a deposition under Rule 30(b)(6) as to limited matters, responding to these requests in an expedited manner will not unduly burden Google.

As Ascentive has highlighted in its preliminary-injunction moving papers, it has suffered and continues to suffer irreparable harm as a result of Google's conduct. Ascentive needs this limited, expedited discovery to bring about speedy resolution of this matter to end the irreparable harm that continues to be inflicted on it by Google.

**CONCLUSION**

For all the reasons stated above, plaintiff Ascentive, LLC, respectfully requests that the Court grant its motion and allow the immediate service of the proposed discovery, and require defendant Google, Inc., to promptly respond to the attached discovery requests.

Respectfully submitted,

By: ______________________________

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Dated: July 24, 2009